

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs October 21, 2009

**BOBBY WAYNE JENKINS v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Davidson County**  
**No. 2003-B-1279      Cheryl Blackburn, Judge**

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**No. M2008-01835-CCA-R3-PC - Filed February 19, 2010**

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The Petitioner, Bobby Wayne Jenkins, appeals the Davidson County Criminal Court's denial of his petition for post-conviction relief. Following a jury trial, he was convicted of one count of especially aggravated robbery. He argues that he received the ineffective assistance of counsel at trial because his trial counsel failed to: (1) have the Petitioner psychologically evaluated as to his ability to knowingly and voluntarily waive his rights to counsel and to remain silent prior to a hearing on a motion to suppress certain statements he made; (2) call as a witness at that motion hearing the psychologist who had previously evaluated the Petitioner; (3) have the Petitioner psychologically evaluated as to his ability to form the intent necessary for conviction of the offenses with which he was charged; (4) call the Petitioner's psychologist as a witness at trial; and (5) either proffer the psychologist's testimony or file an interlocutory appeal after the trial court excluded his proposed expert mental health testimony. After our review, we affirm the judgment of the post-conviction court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

DAVID H. WELLES, J. delivered the opinion of the Court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

Diane E. McNamara (on appeal); and Thomas O. McIntyre (at trial), Nashville, Tennessee, for the appellant, Bobby Wayne Jenkins.

Robert E. Cooper, Jr., Attorney General and Reporter; Melissa Roberge, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; Brett Gunn, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

### Factual Background

A post-conviction hearing in this case was held on April 3, 2008. The Petitioner first called his trial counsel. Trial counsel testified that he requested a psychological evaluation of the Petitioner, after which the Petitioner was evaluated by Dr. James Walker, a psychologist. Trial counsel requested this evaluation in anticipation of using any evidence of a mental defect as evidence that the Petitioner lacked culpability for his conduct. Trial counsel said that Dr. Walker viewed the Petitioner as being capable of forming the intent necessary for the commission of especially aggravated robbery. Relying on this opinion, trial counsel did not consider requesting another psychological evaluation.

The Petitioner introduced Dr. Walker's evaluation at his post-conviction hearing. The evaluation includes information from an interview with the Petitioner's mother indicating that the Petitioner was sexually abused as a child. His mother also indicated that the Petitioner had a history of cruelty to animals, including attempts to set dogs on fire. She said he once set a family member's barn on fire, and he continued to be "fascinated with fire."

The Petitioner also testified at his post-conviction hearing. He said that he had only one meeting with Dr. Walker. The meeting lasted about two hours. He said he had never been cruel to animals. As to his especially aggravated robbery charge, he confirmed that he held a convenience store clerk at gunpoint. At the time, he did not feel he was doing anything wrong because he just "didn't know it was wrong."

The post-conviction court denied the Petitioner relief. He now appeals.

### Analysis

To sustain a petition for post-conviction relief, a petitioner must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. See Tenn. Code Ann. § 40-30-110(f); Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999). Upon review, this Court will not reweigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the post-conviction judge, not the appellate courts. See Momon, 18 S.W.3d at 156; Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997). The post-conviction judge's findings of fact on a petition for post-conviction relief are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence preponderates against those findings. See Momon, 18 S.W.3d at 156; Henley, 960 S.W.2d at 578.

The Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to "reasonably effective" assistance, that is, within the range

of competence demanded of attorneys in criminal cases. Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

The Petitioner based his post-conviction claim on his theory that his trial counsel was ineffective. A lawyer's assistance to his or her client is ineffective if the lawyer's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the defendant's lawyer and actual prejudice to the defense caused by the deficient performance. Id. at 687; Burns, 6 S.W.3d at 461. The defendant bears the burden of establishing both of these components by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The defendant's failure to prove either deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

In evaluating a lawyer's performance, the reviewing court uses an objective standard of "reasonableness." Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel's choices "and should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel's tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel's alleged errors should be judged in light of all the facts and circumstances as of the time they were made, see Strickland, 466 U.S. at 690; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

A trial court's determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the trial court's findings of fact with regard to the effectiveness of counsel under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. Id. "However, a trial court's conclusions of law—such as whether counsel's performance was deficient or whether that deficiency was prejudicial—are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court's conclusions." Id. (emphasis in original).

The State argues that the Petitioner has waived his first, second, fourth, and fifth issues by failing to raise them in his petition for post-conviction relief or explore them in his post-conviction hearing. The State also argues that the Petitioner has failed to show that his trial counsel's performance was deficient. Regardless of waiver or trial counsel's performance, however, we note that the record simply contains no evidence which, if believed, would support the conclusion that the outcome of the Petitioner's trial would have been different had trial counsel taken the Petitioner's desired actions. The Petitioner has failed to prove that his defense was prejudiced by any alleged deficient performance by trial counsel.

When a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing. As a general rule, this is the only way the petitioner can establish that (a) a material witness existed and the witness could have been discovered but for counsel's neglect in his investigation of the case, (b) a known witness was not interviewed, (c) the failure to discover or interview a witness inured to his prejudice, or (d) the failure to have a known witness present or call the witness to the stand resulted in the denial of critical evidence which inured to the prejudice of the petitioner. It is elementary that neither a trial judge nor an appellate court can speculate or guess on the question of whether further investigation would have revealed a material witness or what a witness's testimony might have been if introduced by defense counsel. The same is true regarding the failure to call a known witness. In short, if a petitioner is able to establish that defense counsel was deficient in the investigation of the facts or calling a known witness, the petitioner is not entitled to relief from his conviction on this ground unless he can produce a material witness who (a) could have been found by a reasonable investigation and (b) would have testified favorably in support of his defense if called.

Black v. State, 794 S.W.2d 752, 757-58 (Tenn. Crim. App. 1990). In this case, the Petitioner did not develop at his post-conviction hearing any evidence or argument in support of his first, second, fourth, and fifth issues on appeal. As to his third issue on appeal, the Petitioner failed to present testimony that he was, in fact, unable to form the intent necessary for conviction of the offenses with which he was charged. This appeal is without merit.

### **Conclusion**

Based on the foregoing authorities and reasoning, we affirm the judgment of the post-conviction court.

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DAVID H. WELLES, JUDGE